Petition

81-1569

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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

LORENE L. ROGERS, INDIVIDUALLY AND AS PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Petitioners

V.

PHILIP L. WHITE,

Respondent

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that Philip L. White was "retaliated" against for the exercise of his First Amendment rights when an administrator, without animus but with benevolence, determined not to give him a portion of a tentative salary increase.

2. Whether the Court of Appeals erred by applying the test of *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), where the First Amendment activity involved played no part in assessing White's qualifications for a raise and whether, in any event, the Court properly applied the *Mt. Healthy* holding.

PARTIES TO THE PROCEEDING

In the District Court below, Philip White, as Plaintiff, brought suit against:

> Lorene L. Rogers, Individually and as President of the University of Texas at Austin;
>
> Dr. James E. Bauerle, Edward Clark, Mrs. Lyndon B. Johnson, Thomas H. Law, A. G. McNeese, Jr., Dr. Joe T. Nelson, Allan Shivers, Walter G. Sterling, and Dan C. Williams, Individually and as members of The Board of Regents of the University of Texas at Austin.

None of these individuals are still serving in the capacities described. However, Lorene L. Rogers as the former President of the University, is the real party in interest and no defect as to parties is alleged by Petitioners.

INDEX

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

INDEX iii

INDEX OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 12

CERTIFICATE OF SERVICE 13

APPENDICES A-1

INDEX OF AUTHORITIES

Cases **Page**

Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977) 6,8,11

Pickering v. Board of Education, 391 U.S. 570 (1968) 6,8

Zenith Radio Corp. v. Hazetline, 395 U.S. 100 (1969) 9

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V.

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Petition for Writ of Certiorari
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For the Fifth Circuit

Petitioners, Lorene L. Rogers, President of The University of Texas at Austin, individually and in her official capacity, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on October 13, 1981, with Petitioners' Timely Motion for Rehearing being denied on November 23, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals, for wich review is sought, is reported at 658 F.2d 1055. A copy of the

opinion is also included in the Appendix to this Petition. The District Court opinion (entered as "Memorandum Opinion and Order") is not reported but is included in the Appendix together with the District Court's judgment.

The judgment of the Fifth Circuit and its Order denying rehearing is also set out in the Appendix.

JURISDICTION

The opinion of the Court of Appeals was entered on October 13, 1981. Petitioners' Petition for Rehearing, which was timely filed, was overruled by the Court of Appeals on November 23, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Jurisdiction of the District Court was invoked under 42 U.S.C. §1983.

CONSTITUTIONAL PROVISIONS INVOLVED

The free speech clause of the First Amendment and Fourteenth Amendment to the United States Constitution are involved in this cause.

The First Amendment provides in part:

> Congress shall make no law...abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment provides in pertinent part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law...

STATEMENT OF THE CASE

This case involves the setting of faculty salaries at The University of Texas at Austin for the fiscal year 1975-1976. Salaries were recommended on the assumption that each department would receive a 5% increase in funds over the previous year. Salary recommendations were first made by departmental budget councils and then reviewed by the department chairmen, the deans of the various schools and finally by the President, Dr. Lorene Rogers, who in turn was to submit the recommendations as approved by her to the Board of Regents. Dr. Rogers had the authority to approve the recommendations submitted to her, or to raise or lower the recommendations at her discretion.

However, before submitting her recommendations to the Board of Regents, the Texas Legislature provided 6.8% additional money for University salaries. Dr. Rogers, a distinguished academician, but also a bureaucrat, determined to allocate all of the money available and added the increased funding to the pending salary recommendations in the form of $400 additional raises for about two-thirds of the faculty.

Among those to whom this $400 amount was recommended was Dr. Philip L. White. He was initially recommended by his department and dean for a $1,900 salary increase which was approved by Dr. Rogers. The additional $400 increment added by Dr. Rogers meant that White would receive a total raise of $2,300.

A few weeks later, Dr. Rogers learned that while the Board of Regents had the authority to override all budgetary decisions, they would review on an individual basis only recommended increases over $2,000.00 and she might be required to justify such raises. Accordingly, she again reviewed all of her proposed salary recommendations in excess of $2,000 in order to be assured that she could justify them if called upon to do so.

When Dr. Rogers reviewed the recommendation for Dr. White, she remembered that he had been observed attending legislative budgetary sessions where members of the Legislature commented critically on the time University professors spent at legislative sessions. It is important to note that Dr. Rogers knew of White's activities before the Legislature at the time she originally decided to award him the additional $400 salary increment.

Given the limited Regental review of raises over $2,000, Dr. Rogers worried that White's name might also be known to the Regents because of his legislative activities and decided that she would have a difficult time justifying any raise to him. The difficulty, in Dr. Rogers' mind, stemmed from the circumstances of White's recent questionable promotion from Associate Professor to Professor where conflicting recommendations had been made, but not from his activities before the Legislature. In the words of Dr. Rogers, repeated in the Opinion of the Circuit Court of Appeals at 658 F.2d 1064, she explained:

> "We had just been through the promotion process with Dr. White in December. There had been a question as to whether he should be promoted or not. The average time for a person to move from the associate professor level to the full professor level is about eight years. He had

> been an associate professor for fifteen years, and we finally made the decision to go ahead and promote him, but it was on that basis that I was not certain that I could say, 'Well, he's one of our really outstanding scholars,' if anyone called on me to justify that."

Accordingly, she finally submitted to the Board of Regents the original departmental and school recommendation for Dr. White of a $1,900 raise, thus placing him in a category where Dr. Rogers would not be called upon to justify his salary increase.

Dr. White and seven other professors, who had had salary recommendations reduced by President Rogers, filed suit. White's claim centered on the allegation that his salary was reduced by $400 because of legislative lobbying on behalf of TACT, a teaching organization of which Rogers herself was a member. The District Court found against all plaintiffs and for Dr. Rogers.

White and two others appealed to the Circuit Court of Appeals. Judgment was affirmed as to the two other appellants but was reversed in the case of White.

This Petition for Writ of Certiorari questions the reversal of the District Court's judgment in the case of Dr. White.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Marks the First Time a Court Has Found That First Amendment Rights Have Been Violated Where a Boon or Benefit Has Been Granted Rather Than Where a Bane or Retaliation Is Imposed

As Such, the Decision Below Conflicts with *Pickering v. Board of Education*, 391 U.S. 570 (1968).

Initially, it should be emphasized that White's First Amendment activity, his appearance before the Texas Legislature, was not the *reason* Dr. Rogers determined against awarding the additional $400.00 to Dr. White. The reason was that Dr. Rogers would have been hard put to justify *any* raise to White if called upon to do so because he was not one of the University's "outstanding scholars" as evidenced by his very late promotion to full Professor, a questioned promotion which she apparently intervened in to accomplish.

In Dr. Rogers' mind, the First Amendment activity *might*, if the Board of Regents knew of such activity, be the cause for focusing on White's academic accomplishments by the Board, accomplishments that Dr. Rogers felt might not have justified *any* raise at all. As held by *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), at page 286, an employee "ought not to be able, by engaging in... (First Amendment) conduct, to prevent an employer from assessing his performance and reaching a decision" as to pay, promotion, or retention.

Here a 5% increase was initially contemplated to be available for pay raises. The departments and colleges made salary recommendations to the limits of those expected funds. White's recommended raise of $1,900 was approved by President Rogers evem though at that time she knew of his "First Amendment activities" before the Legislature. And, when she learned there was additional money available, again with full knowledge of his "First Amendment activities", she tentatively set an additional $400 raise for White, or a total increase of $2,300. These actions on the part of Dr. Rogers certainly do not indicate any intention on her part to retaliate

against Dr. White for his "First Amendment activities", but, to the contrary, indicate that Dr. Rogers intended to give him all the money she could without regard to those activities.

It was only after she later acquired information that Regental scrutiny would be directed at raises of over $2,000 that Dr. Rogers made her decision to reconsider the additional $400 amount because:

1. White's name might be known to the Board; and,

2. If White's raise had been examined, perhaps *any* raise would have been hard to justify, not because of his "First Amendment activities", but because of the circumstances relating to his recent promotion to full Professor.

White's First Amendment activities were only significant because those activities might have called attention to him by those "assessing his performance record." 429 U.S. at 286. It should be emphasized that *any activity* that would have made him known to the Regents could have generated this scrutiny. White could have had a serious automobile accident, prompting headlines such as "University Professor Philip White Involved in Serious Auto Crash", or he could have fallen from a balcony during graduation ceremonies, generating news items headed "Professor White Upset by Graduation", or he might have won the Capitol City Marathon headlined as "UT Professor White Walks Away With Running Honors."

The mere fact of being known, however the name identification is established (personal First Amendment activities or reports of activities through First Amendment publications), should not be a basis for a decision such as the Court below reached: that, absent First Amendment activity, the $400 raise would not have been withheld.

Moreover, it is important to reiterate that Dr. Rogers intended to *protect* Dr. White because of his possible name identification and insure that he received at least the $1,900 raise recommended by his department.

Under the facts presented by the record, certainly *retaliation* was furthest from Dr. Rogers' mind. Yet the Court of Appeals, after stating that there can be "relief only if President Rogers reduced ... recommended salaries in retaliation for the exercise of constitutionally-protected rights" [658 F.2d at 1057-1058], ignored the stated principle by apparently finding "retaliation" without supporting evidence, a factor that seemingly must be present under this Court's holding in *Pickering v. Board of Education*, 391 U.S. 570 (1968).

This Court should grant the Writ of Certiorari in this cause and hold that proof of retaliation and animus are required to find that a state action is violative of the First Amendment and reiterate that mere name identification through First Amendment activity will not prevent an employer from assessing the performance of an employee and acting in accordance with that assessment.

2. The Decision Below Conflicts with or Misapplies *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977)

Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), held that the mere fact that an employee's First Amendment activity focuses attention on that employee and in fact plays a part in a decision to terminate that employee, such decision is not impermissible if the same decision would have been reached if the protected activity had not occurred.

The Court below held, in effect, that:

> "...because Rogers clearly subjected White to stricter scrutiny because of his political activities, we conclude that White's activities were a 'substantial' or 'motivating' factor....in her decision to withhold the $400 salary increase. White's prior political efforts were essentially the reason why Rogers felt that she had to reevaluate White's proposed salary increase." 658 F.2d at 1064.

The Court then rejected, in toto, Dr. Rogers' evaluation that circumstances aside from his "First Amendment activities" made it likely that any raise for Dr. White would be hard to justify, and instead stated that:

> "...because Rogers has failed to prove that she would have made the same decision even in the absence of the protected conduct, all elements of the *Mt. Healthy* test are satisfied and White is therefore entitled to relief. 658 F.2d at 1065.

The Court below thus ignored the true reason the $400.00 increase was withheld, i.e., it could not be justified because he was not an "outstanding scholar", and ignored the District Court's finding that the withholding was not due to protected activities or that such withholding was not done because of retaliatory intent. The Court of Appeals held that the later finding of the District Court was clearly erroneous.[1]

The District Court, as noted, found that White "failed to establish that Defendant's actions were in retaliation for Plaintiff's exercise of constitutionally-protected rights." This finding, if not clearly erroneous, actually

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[1]This Court of Appeals' conclusion is in conflict with this Court's holding in *Zenith Radio Corp. v. Hazeltine*, 395 U.S. 100 (1969).

removes *Mt. Healthy* from the arena of this case, since *Mt. Healthy* holds that the protected acitivity must necessarily be taken into account by those making an employment decision and must "indeed play a part in that decision." 429 U.S. at 285. And it is submitted that the finding of the trial court is eminently correct in view of the fact that Rogers' actions were beneficent rather than retaliatory.

It is interesting to speculate that if Rogers had done nothing and permitted the $2,300 raise to be submitted to the Board and if the raise had been called into question, the Board's examination into White's scholarship and his questioned promotion could well have resulted in *no raise at all.* Then *Mt. Healthy* might be properly applied if, *and only if,* White's legislative appearances were a motivating factor in the Board's "no-raise" decision. But, at the same time, the other stated justifications would be present for the operation of the *Mt. Healthy* "but for" test as the Court of Appeals below characterized the *Mt. Healthy* decision.

This speculation demonstrates one point under *Mt. Healthy*–it is indeed probable that White was placed in "no worse a position (by Rogers' action) than if he had not engaged in the conduct." 429 U.S 286. In fact, he was probably placed in a better position because, by her action, Dr. Rogers precluded any inquiry into whether White merited the $1,900 salary increase he received.

Petitioners assert that the Court of Appeals' decision clearly misconstrues *Mt. Healthy* by applying its test to the case at bar and is in conflict with *Mt. Healthy* in failing to examine the true reason for withholding the additional $400 raise--White's lack of scholarship would not justify the additional raise or perhaps any raise, and might show his promotion was ill-advised.

The Court of Appeals held "that 'but for' White's political activities, Rogers would not have subjected White's recommendation to more intense scrutiny and would not have decided to rescind her grant of the $400 merit raise to him." 658 F.2d at 1065. This holding of the Court of Appeals not only ignores *Pickering's* requirements that retaliation be a necessary element of proof, but it completely subverts this Court's holding in *Mt. Healthy City School District v. Doyle.* According to the Court of Appeals, any individual who happens to be an out-spoken, politically active figure with some degree of public name identification is forever insulated from any unfavorable administrative action because his "protected" activities can always be claimed by him as the "trigger" that prompts any administrative review into his performance and qualifications when ascertaining whether an administrative decision, either favorable or unfavorable, to that individual can be justified. Thus, the Court of Appeals falls into the same error committed by the District Court in *Mt. Healthy City School District v. Doyle.*

It is submitted that even though the review of Dr. White's performance and qualifications was "triggered" by his protected activity, there is no evidence in the record that the protected activity was" a 'substantial factor'--or to put it in other words, that it was a 'motivating factor'" [429 U.S. at 287] in the decision that his performance and qualifications would not support a raise in excess of $2,000, and certainly there is no evidence that such decision would not have been the same "but for" the protected activity. In fact, the evidence is to the contrary. Once the review was undertaken, for whatever reasons, the decision would have been the same.

A writ of certiorari should issue to clear up the confusion engendered by the Court of Appeals in its application of *Mt. Healthy* to this case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument have been served upon Respondentby depositing same in the United States Mail, certified, return receipt requested, addressed to Attorney of record for Appellants:

Mr. David R. Richards
600 West 7th Street
Austin, Texas 78701

on this the _____ day of February, 1982.

_____
LAURA S. MARTIN

Appendix

APPENDIX

1. Opinion of the Court of Appeals
2. Fifth Circuit Order Overruling Petition for Rehearing
3. Fifth Circuit Judgment
4. District Court Memorandum Opinion and Order
5. District Court Judgment

EDWIN B. ALLAIRE, ET AL.,
Plaintiffs

PHILIP WHITE, ET AL.,
Plaintiffs-Appellants,

V.

LORENE L. ROGERS, ET AL.,
Defendants-Appellees.

No. 80-1407.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.*
UNIT A

OCT. 13, 1981.

Three politically active tenured professors sued university president and board of regents after being denied the full salary increases for which they had been recommended. The United States District Court for the Western District of Texas, Jack Roberts, J., rendered judgment for the defendants and professors appealed. The Court of Appeals, Tate, Circuit Judge, held that the District Court's finding that the salary actions were not taken in retaliation against the professors' exercise of their First Amendment right to freedom of speech and association was not clearly erroneous as to two of the professors, but was clearly erroneous as to the third professor.

Affirmed in part, reversed in part, and remanded.

1. **Colleges and Universities 8.1(6)**

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*Former Fifth Circuit case, Section 9(l) of Public Law 96-452—October 14, 1980.

District court finding that denial to two university professors of full salary increases for which they had been recommended was not taken in retaliation against their exercise of their First Amendment right to freedom of speech and association was not clearly erroneous. U.S.C.A. Const. Amend. 1.

2. Constitutional Law 82(8)

Where recommended salary increase for university professor was subjected to stricter scrutiny by university president because of professor's political activities and salary was ultimately reduced, university professor's activities were substantial or motivating factor in denial of increase and denial violated professor's First Amendment rights. U.S.C.A. Const. Amend. 1.

3. Constitutional Law 90.1(1)

Absent proof of false statements knowingly or recklessly made, university professor's right to speak on issues of public importance is protected by First Amendment. U.S.C.A. Const. Amend. 1.

Appeal from the United States District Court for the Western District of Texas.

Before RUBIN, RANDALL and TATE, Circuit Judges.

TATE, Circuit Judge:

The plaintiffs, eight politically active tenured professors at the University of Texas at Austin (UTA), brought this 42 U.S.C. § 1983 action against UTA President Lorene Rogers and the UTA Board of Regents after being denied the full salary increases for which they had

been recommended for the fiscal year 1975-1976. The plaintiffs alleged that this salary action was taken in retaliation against their exercise of their first amendment right to freedom of speech and association. After a bench trial, the district court ruled that the plaintiffs were not entitled to the requested injunctive, declaratory, and monetary relief. Contending that the district court's finding that the plaintiffs had failed to prove retaliatory intent was clearly erroneous, three of the plaintiffs, Professors White, Gavenda, and Shepley, now bring this appeal. We find that the district court's decision was clearly erroneous only with respect to plaintiff-appellant White. Therefore, the decision must be affirmed in part, reversed in part, and remanded for further proceedings in accordance with this opinion.

I. *The Factual Background*

A. *The Controversial Activities of Professors White, Gavenda, and Shepley*

In 1975, Professor Gavenda was president, and Professor White was legislative representative and past president, of the UTA chapter of the Texas Association of College Teachers (TACT). This organization was involved in lobbying the state legislature for additional funds for faculty salary increases. To further this lobbying effort, White prepared a report entitled "Excellence at UT Austin," in which he demonstrated, among other things, that UTA faculty salaries had rapidly declined in comparison with other leading public universities, and that UTA had the worst student-faculty ratio of any major university in the United States. The report was distributed to the members of the UTA Board of Regents and to legislative leaders. Gavenda, along with Professor Hill, one of the plaintiffs below who have not appealed, attempted to further the cause by appearing before the state legislature's budget board and by lobbying several individual legislators.

There is some question how effective the TACT lobbying efforts were. The defendant President Rogers testified that certain legislators and others had complained to her that Gavenda and Hill had presented misleading data. These individuals claimed that Gavenda and Hill had included teaching assistants in determining the average salary at UTA but had not included them in determining the salaries of the other universities with which UTA was being compared. (Although Rogers could not recall any criticism of White, presumably Gavenda and Hill were using the figures from his report.) Furthermore, some legislators questioned how supposedly full time faculty members could be spending so much time at the legislature. Regardless of whether the TACT lobbying efforts had any positive or negative impact, in 1975 the Texas legislature allocated UTA money for faculty merit raises for the first time in six years.

At the same time these events concerning faculty salaries were occurring, the plaintiff-appellant Professor Shepley became involved in an unrelated controversy with the UTA administration. At that time Shepley was serving as president of the Austin Chapter of the American Association of University Professors (AAUP), an organization dedicated to promoting academic freedom and preserving teachers' rights. After being contacted by members of the faculty of the University of Texas Nursing School at Austin, he wrote several letters on behalf of the nursing faculty with regard to alleged violations of the rules regarding promotion to tenure. Shepley admitted, and it is clear from the content of the letters, that he wrote both as an individual faculty member and as president of the AAUP. He had these letters typed by a physics department secretary, on UTA stationery, and then transmitted the communications through the university mail system. President Rogers considered these actions to be violations of a university rule limiting use of university services and supplies to

"official budgetary units."[1] She informed Paul Olum, the dean of Shepley's department, of the violation and asked him to investigate the possibility of disciplinary action. Dean Olum responded that in his opinion no disciplinary action should be taken in light of the vagueness of the rule and Shepley's good faith misunderstanding as to what was permissible thereunder.

In addition to the above incidents, all three of the plaintiffs had long been involved in other controversial political activities. They were the leaders of TACT and AAUP, organizations that often were critical of the administration. Also, Shepley and Gavenda had been involved in the university-wide protest concerning the firing of Dr. Steven Spurr, the defendant Rogers' predecessor as UTA president.

B. *The Controversial Decisions of President Rogers*

President Rogers was responsible for determining the raise each faculty member received, subject to final review by the Board of Regents. She reached her decisions after receiving recommendations from three sources: departmental budget councils made up of faculty members, the chairpersons of each department, and the deans of each college. The budgetary process was conducted in two phases. In the first phase, both the recommendations and the president's budget decisions were made on the assumption that each department would receive 5% more for faculty salaries than it had the year before. However, due to the additional money allocated by the legislature for merit raises, a total of 6.8% actu-

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1. The rule provides: "Both campus mail privileges and stenographic and supply services shall be limited to official budgetary units."

ally became available. Therefore, in the second phase, President Rogers distributed the amount over 5% in the form of $400 merit raises to approximately two-thirds of the faculty. New employees and those already receiving over $35,000 a year were automatically excluded from consideration for the $400 raise.

Rogers' salary decisions concerning the three plaintiffs-appellants gave rise to this lawsuit. Although each plaintiff-appellant did in fact receive a raise, the increases they received were reduced by Rogers to less than the amounts recommended by their deans, department chairmen, and budget councils. Shepley's dean, department head, and budget council all recommended that he receive a $1000 raise; President Rogers approved a $400 increase with no merit raise. The budget council in Gavenda's department recommended a $1500 increase for him while his department chairman and dean thought $1000 appropriate; President Rogers gave him a $500 increase and the $400 merit raise for a total of $900. Shepley and Gavenda thus became two of the 78 faculty members, out of a total of approximately 2000, who had their recommended salaries reduced by the president.

Rogers' actions concerning Professor White were somewhat more atypical. First, she approved the full $1900 increase recommended by White's departmental administrators, and, in addition, she awarded him the $400 merit raise, which meant that White would receive a total raise of $2300. A few weeks later, however, Rogers learned that, although the Board of Regents had the authority to override all budget decisions, they would review only increases of over $2000 and that she might be required to justify raises of such magnitude. Subsequently, she withdrew her award of the $400 merit raise to White so that White's total increase amounted to only $1900, safely below the $2000 figure that would trigger Board scrutiny. Of the more than 200 faculty

members who were initially awarded increases greater than $2000, White was the only one whom Rogers reduced after she learned of the Board's policy. Moreover, White was the only member of the history department who did not receive the $400 merit raise. Even three members of the department who were recommended for no increase at all and two who were on "terminal appointment," that is, to be fired at the end of that school year, were found by Rogers to be worthy of this supposedly "merit" award.

C. *The Proceedings Below*

White, Gavenda, Shepley, and the five other professors who have not appealed, felt that Rogers had reduced their recommended salaries in retaliation for their political activities. After efforts by various intermediaries to persuade Rogers to change her mind failed, the eight professors brought this suit. After a two-day bench trial, the district court found that the plaintiffs had done little more than "hypothesize" that Rogers had retaliated against them for engaging in the controversial activities. Accordingly, the court granted judgment in favor of the defendants.

II. *The Applicable Legal Principles*

A. *The Substantive Law Applicable to the Plaintiffs' Claim*

The sole issue on appeal is whether the district court's conclusion that the plaintiffs failed to prove retaliatory intent is clearly erroneous. The professors concede, as they must, that they are entitled to relief only if President Rogers reduced their recommended salaries in retaliation for the exercise of constitutionally-protected rights. The professors do not claim any form of contrac-

tual or legal right to receive the maximum possible raise, or, for that matter any raise at all, and they do not dispute the fact that Rogers could lawfully have taken the action she did for a number of reasons, no matter how questionable or irrational, or for no reason at all. As the Supreme Court has noted,

> In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop v. Wood, 426 U.S. 341, 350, 96 S.Ct. 2074, 2080, 48 L.Ed.2d 684 (1976).

The legal principles applicable to the plaintiffs' claims are not in dispute. Both sides agree that the case is governed by *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1972), and subsequent decisions of this court. Pursuant to the principles enuciated by the Supreme Court in *Mt. Healthy*, the plaintiffs have the burden of proving that their conduct was constitutionally protected and that this conduct was a "substantial" or "motivating" factor in Rogers' decisions to reduce their recommended raises. Once the plaintiffs meet this burden, the defendants have the burden of proving that the same salary decisions would have been made even in the absence of the protected conduct. *See Mt. Healthy, supra*, 429 U.S. at 287, 97 S.Ct. at 576. *See also Bickel v. Burkhart*, 632 F.2d 1251, 1254 (5th Cir. 1980); *Van Ooteghem v. Gray*, 628 F.2d 488, 491 (5th Cir. 1980), *on rehearing*, 654 F.2d

304 (5th Cir. 1981) (en banc).[2] Without deciding whether the plaintiffs' conduct was constitutionally protected or whether the same salary decisions would have been made regardless of the controversial conduct, the district court ruled in the favor of the defendants, because it found that the plaintiffs had failed to prove that their arguably protected conduct was a "substantial" or "motivating" factor in the president's decisions.

B. *The Standard of Review*

The appealing professors do not question our holding in *Van Ooteghem, supra,* that the district court's findings cannot be disturbed unless they are "cearly erroneous" within the meaning of Federal Rule of Civil Procedure 52(a).[3] Therefore, we cannot reverse the district

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2. *Mt. Healthy* involved a teacher who allegedly had been discharged in retaliation for his exercise of first amendment rights, but it is now established that the same principles apply when retaliation takes place in the form of altered employment conditions rather than termination. *See Bickel v. Burkhart, supra,* 632 F.2d at 1255 n.6 (denial of promotion); *Swilley v. Alexander,* 629 F.2d 1018 (5th Cir. 1980) (placement of letter of reprimand in teacher's personnel file); *McGill v. Board of Education,* 602 F.2d 774 (7th Cir. 1979) (retaliatory transfer).

3. In *Van Ootegehm,* the panel applied the clearly erroneous standard, rejecting the appellant's argument that, as in Title VII discrimination suits, we should treat the district court's findings on employer's motivation as "ultimate facts" subject to plenary review. We found that it would subvert the clear mandate of Fed.R.Civ.Pro. 52 to apply the phrase "ultimate fact" to important factual questions simply to justify plenary review. 628 F.2d at 491-92. The *en banc* court also applied the clearly erroneous test, but it did not state any reasons for rejecting the appellants' argument. 654 F.2d at 305.

Rule 52(a) provides in pertinent part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of a trial court to judge of the credibility of the witnesses."

court finding that President Rogers did not lower the recommended salary raises of the plaintiff professors in retaliation for their exercise of constitutional rights of free speech, unless, after careful review of all the evidence, we are "left with the definite and firm conviction that a mistake has been committed." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969), *quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). *See* 9 Wright & Miller, Federal Practice and Procedure § 2585 (1971). Although if we were the trier of fact we might have reached conclusions that differ from the district court's findings with respect to Shepley and Gavenda, we are not able to say that these findings are erroneous with the requisite "definite and firm conviction." On the other hand, we have no doubt that the court's findings are clearly erroneous with respect to White.

III. *The District Court's Findings Regarding Shepley and Gavenda Are Not Clearly Erroneous*

[1] As is frequently the case in disputes of this nature, there was no direct proof that President Rogers sought to retaliate against the plaintiff professors. As the district court noted, the plaintiffs who testified at trial could chiefly "hypothesize" that Rogers acted in response to their political activities. Rogers, as might be expected, adamantly denied that the plaintiffs' political activities had had any effect on her decisions. She testified that she was not opposed to Gavenda's lobbying efforts to obtain money for salary increases, and that her only complaint about Shepley's AAUP activities was his use of campus facilities to prepare and distribute the letters he wrote on behalf of the nursing school faculty. Rogers claimed that she reduced Gavenda's recommended raise because he was already receiving a relatively high salary in comparison with others in his de-

partment and because, during the ten years she had known him, she had seen little evidence of outstanding teaching ability or scholastic productivity. As to Shepley, she testified that his recommended raise was lowered partially as a penalty for his abuse of the faculty mail system and partially due to the general impression she had of his academic performance.

Despite the absence of a "smoking gun" that definitely proves retaliatory intent on the part of Rogers, a considerable amount of circumstantial evidence suggests this conclusion. A rather high percentage of the professors who were adversely affected by Rogers' decisions were outspoken activists, and an inference of retaliatory motive might be drawn from this fact. The dean of the UTA College of Humanities commented in a letter he wrote to President Rogers that, "when all is said and done, the list of persons affected together with their functions of academic and professional activities speaks too plainly." A faculty senate fact-finding committee concluded that "there exists a correlation between certain faculty activities and lack of salary reward, a pattern which could not have been accidental." In the five departments examined by the committee, eleven of the twenty-four individuals who were either not awarded the $400 merit raise or did not receive the recommended salary increase, or both, were engaged in controversial political activities.[4]

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4. The committee report stated in pertinent part:

> In making this particular analysis we considered no terminal or modified service appointments. In the five departments, with a total of 177 faculty members, the following patterns emerged: (1) there appear to have been 24 cases where the individuals either were not awarded the presidential merit increase or did not receive the recommended salary increase or both; (2) of these 24 seven were either presidents of AAUP or

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Other evidence has also led us to have some question as to the correctness of the district court's findings regarding Shepley and Gavenda. Dr. Griffy, chairman of the UTA physics department of which Shepley and Gavenda were faculty members, testified that he spoke by telephone with President Rogers shortly after she made her salary decisions. Griffy protested the cuts in Gavenda's and Shepley's salary increases. Griffy made notes of the conversation within a month or so after it had occurred; he testified that the notes were an accurate reflection of what was said. When questioned about Gavenda and Shepley, Dr. Griffy's notes showed that Rogers responded that it "[w]ould be inappropriate to reward with substantial raises those individuals whose actions during the past year were at times not in the best interest of the university." Although, according to Griffy's notes and testimony, AAUP and TACT were never explicitly mentioned during the conversation, Griffy apparently was left with the strong impression that Rogers' actions were intended as retaliation

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TACT or members of the Counsel on Academic Freedom and Responsibility or chairperson of a major faculty organization; (3) in addition, three of the 24 were administrative officers of budgetary units which may have been controversial; (4) one of the 24 was an outspoken critic of administrative practices; (5) of the 24 one had a comparatively high salary; and (6) of the 24, 12 were either unexplainable (perhaps because of insufficient data) or they fell into other categories such as that of having an abrasive personality.

These 24 cases constitute about 14% of the 177 faculty members in the five departments, and the seven cases cited in (2) above constitute about 29% of the 24. In addition to these 24 cases wherein the committee has unmistakable evidence, there are numerous other cases of alleged irregularities not included above for one of two reasons: (1) the professor involved asked that his case not be made a matter of public record; or (2) the data available were not so complete.

against Shepley and Gavenda for their activities on behalf of these organizations.[5] Rogers denied ever having made such a statement. She testified that Griffy told her that it seemed strange that the presidents of both TACT and AAUP had their recommended salaries reduced, and she replied that their activities had "nothing to do" with her salary decisions.[6] While we feel sure that President Rogers was testifying to her best recollection as to the conversation that had occurred several years earlier, the record reflects no reason to question the accuracy of Dr. Griffy's notes of the conversation, recorded soon after the event, or his credibility in so testifying.

5. Gavenda testified that Griffy was "obviously very upset" after his conversation with Rogers. At trial, Griffy, who then still headed the UTA physics department, was somewhat more circumspect as to his conclusions regarding his conversation with Rogers:

> Q. In her conversations did she ever lead you to believe that she had taken some type of retaliatory measure toward these two individuals?
>
> A. I'm afraid I will have to ask from some clarification of the word "retaliatory".
>
> Q. Did you feel that she had reduced their salary increases because of their activities either with TACT or AAUP or whatever their activities would have been in regards the University?
>
> A. I do not ever remember—I do not remember ever hearing the words "TACT," or "AAUP" used during our conversations. Her response was that she felt that it would not be appropriate to reward activities which she felt was not in the best interest of the University. Now it's a question of whether you consider not rewarding retaliatory.

6. Rogers' verbatim testimony regarding the conversation with Griffy was as follows:

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Rogers repeatedly denied that the plaintiffs' political activities had any impact on her salary decision. However, she did admit at her deposition that she was unsure whether she had been able to disregard totally the information she had received about Gavenda's purported misstatements to the legislature:

Q. You had at least formed the impression that he [Gavenda] was presenting misleading information to the Legislature?

A. Right.

Q. Can you say you were able to discard that completely from your decision making process?

A. No, I don't know whether I could or not.

Furthermore, she could not deny at the deposition (although she did deny at trial) that she may have felt that Gavenda's TACT activities had diminished his effectiveness as a faculty member:

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Dr. Griffy called me and said that he thought it was striking or strange, I'm not sure of the word he used, that two of the people in his department whose recommended salaries were reduced, was the president of TACT and the president of AAUP. I assured him that their activities there had nothing to do with that, with my setting of salaries, and he then said that he thought especially strange in Dr. Gavenda's case because it was his understanding that Dr. Gavenda and Dr. Hill had been most instrumental in getting this salary raise money for that year, and at that point I told him that was not my understanding, that I had had negative feedback from the data that they had presented from members of the Legislature as well as some of the people of the system. I do not recall exactly who it was. I went on to say that this was not my reason why I cut this, but at the same time that I did not see that it was a reason for raising salaries.

Q. Did you take into account, in forming your general impression [of Gavenda], his activities with TACT and whether that in fact might have diminished his effectiveness as a member of the faculty?

A. I do not know that I can answer that with any degree of specificity.

Rogers Dep., at 38–39.

In view of all this evidence that Rogers did in fact act with retaliatory intent, if we were making a *de novo* factual determination, we might well conclude that the plaintiffs had carried their burden of proving that their political activities were a "substantial" or "motivating" factor in Rogers' salary decisions. However, we are unable to find that the district court's contrary conclusion was clearly erroneous.

The primary reason why we have determined not to disturb the district court's findings with respect to Gavenda and Shepley is that the statistical evidence of record is simply too inconclusive to permit us to form the necessary "definite and firm conviction" that the district court's findings were erroneous. For example, while the faculty senate committee report indicates that eleven of the twenty-four adversely affected teachers in the five departments examined were engaged in controversial political activities, there is no indication of the percentage of the total number of faculty who were politically active. Obviously, if 11/24 or more of the faculty as a whole were politically active, then no inference of retaliation can be drawn from the fact that 11/24 of the faculty members who received cuts were active.[7]

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7. It is clear that many professors who were at least as controversial and outspoken as the plaintiffs did receive the full recommended salaries. For example, Rogers testified without contradiction that

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Even within the physics department no definitive inferences can be drawn. Gavenda and Shepley were but two of the four full-time physics professors whose recommended raises were reduced.[8] Professors Moore and Sudarshan were the other two; they received cuts larger in amount than either Shepley or Gavenda.[9] Gavenda speculated that Moore was cut because of his abrasive personality and contemptuous attitude towards administrators, but Rogers testified that Moore was a friend and a strong supporter of hers. No explanations for the reduction in Sudarshan's recommendation appear in the record.

The physics department chairman apparently held both Moore and Sudarshan in higher regard than either Shepley or Gavenda. The chairman made his salary recommendations in order of priority. Moore was at the very top of his list, ranked number one in priority, and

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she did not cut back on the recommendation for Dr. Jim Sledd, even though he had talked to legislators more than anyone else, accusing the administration of outright dishonesty in the reporting of faculty work loads. Rogers also mentioned four other "activist or outspoken" professors whose recommendations she did not reduce. On the other hand, it is equally clear that there were many completely uncontroversial faculty members whose recommendations Rogers did cut.

8. Rogers also reduced the recommendations of two other professors who had joint appoinments with the physics department and another UTA department.

9. For Moore, the budget council recommended a $2000 raise, the chairman $4000, and the dean $3000. Rogers gave him $1500, plus the $400 merit award, for a total raise of $1900. For Sudarshan, the budget council, the chairman, and the dean all recommended a $2000 increase. Rogers cut this to $1000. Sudarshan was automatically excluded from consideration for the $400 merit award, because his salary was greater than $35,000.

Sudarshan was rated eleventh of the twenty-seven physics faculty members. On the other hand, Gavenda and Shepley were near the bottom of the chairman's list, ranked twenty-first and twenty-sixth, respectively.

The physics department budget council likewise rated Moore and Sudarshan higher than both Shepley and Gavenda. The budget council made its recommendations in four priority groupings. Both Sudarshan and Moore were included in the "first priority" group, while Gavenda was deemed worthy of only the second priority group and Shepley was placed in the third, or next to last, priority classification. There thus do not appear to be any academic reasons why Gavenda and Shepley should have been accorded treatment more favorable than that which was accorded to their apolitical colleagues Moore and Sudarshan.

Shepley makes two other arguments that require only brief discussion. Rogers stated that if Shepley had written the controversial letters as a faculty member rather than as president of the AAUP, he would not have, in her opinion, violated the university regulations. Therefore, Shepley asserts, because it was merely his association with AAUP that put him in violation of the rules, Rogers violated his right to freedom of association by punishing him for writing the letters on behalf of the AAUP. If we understand this argument correctly, Shepley claims that because he has the right to use the campus mail and other campus facilities for faculty business, he has a constitutional right to use these facilities for AAUP business. But although Shepley has the constitutional right to associate with the AAUP and to write complaints to the UTA administration on behalf of the AAUP, we do not believe it is seriously arguable that the constitution requires the university to subsidize Shepley's exercise of his constitutional rights. The university has the right to protect its property, and to this end it may adopt reasonable regulations with respect to

the time, place, and manner in which speech-related activities are conducted. *See Healy v. James*, 408 U.S. 169, 192-93, 92 S.Ct. 2338, 2351-52, 33 L.Ed.2d 266 (1972); *Dayan v. Board of Regents*, 491 F.Supp. 138, 140 (M.D.Ga. 1979), *aff'd.*, 620 F.2d 107 (5th Cir. 1980).

Shepley also contends that, even if the university could constitutionally prohibit him from using the university mails on behalf of the AAUP, the regulation that he was said to have breached was unreasonable because of its vagueness. Although the written rule (which is reprinted at note 1 *supra*) is hardly a model of clarity, Shepley admitted that he had been well aware for several years that the rule was being "very strictly applied" to the AAUP. Apparently he considered the controversial letters to be university business rather than AAUP business; however, close examination of the letters leaves little room for doubt that he was writing as president of the AAUP, not as an associate professor of physics.[10]

In our view, the only aspect of this controversy that gives rise to a substantial question is not whether Rogers *could* have punished Shepley for violating the rule but whether she *did* in fact do so. In other words, did she truly intend to punish Shepley for his violation of the university mail rule or was this merely a pretextual excuse intended to cover the fact that she was punishing him in retaliation for his substantive work on behalf of the nursing faculty and the AAUP? Inadvertent violation of a rule such as this, which we suspect is often honored only in the breach,[11] hardly seems an ap-

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10. For example, one of the letters expressly begins, "As President of the local chapter of the American Association of University Professors, I have been asked to look into another case involving tenure at the School of Nursing."

11. Shepley testified that he regularly received personal and other unofficial communications through the campus mail. Other evidence in the record is of similar effect.

propriate ground for subjecting Shepley to a sizeable reduction in his recommended raise. However, Shepley has neither contended nor offered any evidence that shows that the president's concern over the violation was pretextual,[12] and Rogers testified that this was just one of the many factors in her decision to reduce his recommendation.

Accordingly, because we do not feel a definite and firm conviction that a mistake has been made, we defer to the district court's finding that Gavenda and Shepley did not meet their burden of proving that their activities on behalf of TACT and AAUP were a "substantial" or "motivating" factor in President Rogers' salary decisions.

IV. *The District Court's Findings Regarding White Are Clearly Erroneous*

[2] Although we have determined that the district court's findings concerning Shepley and Gavenda must not be disturbed, we reach the opposite conclusion with respect to White. Our determination is based primarily upon the admissions of President Rogers at her deposition and at trial. Based on her admissions, we conclude with little difficulty that White's activities on behalf of TACT were a substantial factor in Rogers' decision to withhold the $400 merit raise she had initially awarded him.

As noted previously, Rogers originally gave White the full $1900 raise recommended by his department, plus the $400 merit raise, for a total increase of $2300. How-

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12. In fact, it appears from the record that Rogers was under some pressure from the University of Texas System Office to enforce the rule.

ever, after Rogers received word that the Regents might call upon her to justify raises of more than $2000, she decided to withhold the $400 merit raise from White to keep his total raise below $2000. When asked at her deposition whether she would have given White the full $2300 but for the fact that this decision would have been subjected to special review by the Regents, Rogers answered: "I suspect that he would have, yes." (At trial, she changed her reply to "He might have, but I can't be certain of that because, as I said, I continued to go back through that budget.")

After learning about the Regents' policy on raises greater than $2000, Rogers testified that she decided to reduce White's recommendation for two reasons:

> There were two reasons: One, he had been considered for promotion, had been promoted that year, so this material concerning him was very fresh in my mind at that point.
>
> The other thing was because he had been rather prominent, I figured his name might be more likely to come up than some of the others.

It appears that Rogers made a bipartite analysis. Firstly, she realized that the Regents would be more likely to focus upon White due to his lobbying efforts on behalf of TACT. As she testified at her deposition:

> Q. Well, you did hear criticism of the TACT operation, did you not?
>
> A. Right.
>
> Q. And you knew that he [White] had been at least in attendance at the Legislature?
>
> A. Right.

Q. And you told me that you heard Legislators say to you, "How is it that if these people are to be hired out there to be teaching that they can be spending that time down here talking to us?"

A. That's right.

Q. And, initially, I suppose you heard that criticism of Dr. White?

A. Right.

Q. Did you take in consideration then that that might conceivably be difficult for you to justify an increase for him in excess of $2,000?

A. I don't think that that would make it more difficult to justify. It might have made it more likely that that name be brought up.

Q. If you were called upon?

A. If I were called upon. As a matter of fact, no one's name was brought up.

Q. But at least in your mind there was the fact that he was around the Legislature, and it made it more likely that if someone down at the System Board was looking through your salary recommendations that they might have fixed on his name as being one where you would be pressed to justify; is that right?

A. That's right.

And as she testified at trial:

Q. You testified among other things, that he had been active in TACT, he had been at the Legislature.

A. Right.

Q. And because of that, at least, or in part because of that you thought it was likely that his name might attract attention of the System Office; is that right?

A. It seemed to me that if anyone was going to question names, it would be names that they knew.

Q. Names of those who had been busy and around or busybodies?

A. Well, names of people had been active enough that the name would be known. I doubt if anyone would just pick out a Joe Doe and say, "justify this."

After coming to the realization that White's activities made it more probable that his name would attract attention, Rogers then reevaluated White and determined she was not certain that, if called upon to do so, she could justify giving him a $2300 raise. She testified:

> We had just been through the promotion process with Dr. White in December. There had been a question as to whether he should be promoted or not. The average time for a person to move from the associate professor level to the full professor level is about eight years. He had been an associate professor for fifteen years, and we finally made the decision to go ahead and promote him, but it was on that basis that I was not certain that I could say, "Well, he's one of our really outstanding scholars," if anyone called on me to justify that.

In our opinion, it is irrelevant whether, after making her reevaluation of White, Rogers decided to reduce White's raise below $2000 because of the controversy over his promotion (as Rogers contends), or because she anticipated that the Regents would be hostile to White due to his TACT activities (as the plaintiffs contend). In Rogers' own words, the fact that White's name was "more likely to come up" due to the fact that he had been "rather prominent" was one of her "two reasons" for withdrawing the $400 raise from White. Therefore, because Rogers clearly subjected White to stricter scrutiny because of his political activities, we conclude that White's activities were a "substantial" or "motivating" factor, *see Mt. Healthy, supra*, in her decision to withhold the $400 salary increase. White's prior political efforts were essentially the reason why Rogers felt that she had to reeavluate White's proposed salary increase. If White had been an apolitical "Joe Doe," we are convinced from her testimony that President Rogers would not have reconsidered recommending the full salary increase.

The statistics appear to corroborate this conclusion. Of the several hundred faculty members whom Rogers initially granted increases greater than $2000, White was the *only* one whose recommendation was subsequently reduced. This is so despite the fact that White was more highly regarded within the history department than any of the other history professors for whom Rogers approved increases greater than $2000. In the departmental priority rankings for faculty salary increases, White was ranked third out of forty. Nevertheless, Rogers awarded Professors Graham, Divine, Radkey, and Lasby increases of greater than $2000, even though each of them was ranked significantly lower in priority (eighth, eleventh, twelfth, and twenty-third, re-

spectively) than White.[13] Furthermore, White was the *only* member of the history department who did not receive the $400 merit raise. Despite White's high departmental ranking, Rogers chose to give *every* other history teacher, including those scheduled to be fired, higher "priority" with respect to these so-called "merit" raises than Professor White. Accordingly, we hold that the district court's finding that White has not met his burden of proving that his political activities were a substantial factor in Rogers's decision is clearly erroneous.

[3] Because the district court found that White had failed to prove that Rogers was influenced by White's political activities, the court did not determine whether White's conduct was constitutionally protected or whether Rogers carried her burden of proving that she would have made the same decision even if White had not engaged in the protected conduct. See *Mt. Healthy, supra*, 429 U.S. at 287, 97 S.Ct. at 576. We have already held that "but for" White's political activities, Rogers would not have subjected White's recommendation to more intense scrutiny and would not have decided to rescind her grant of the $400 merit raise to him. And the defendants do not seriously dispute the fact that White's lobbying efforts were entitled to first amendment protection. Absent proof of false statements knowingly or recklessly made, White's right to speak on issues of public importance is constitutionally protected. *See Pickering v. Board of Education*, 391 U.S. 563, 574, 88 S.Ct. 1731, 1738, 20 L.Ed.2d 811 (1968).

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13. Graham and Divine received $1800 raises, plus $400 merit raises, so that each received a total increase of $2200. Radkey received a total increase of $2100 ($1700 plus the $400 merit award) and Lasby received $2134 ($1734 plus the $400 merit award).

Because White has proved that his constitutionally-protected conduct was a substantial factor in Rogers' decision to revoke the grant of the $400 merit raise, and because Rogers has failed to prove that she would have made the same decision even in the absence of the protected conduct, all elements of the *Mt. Healthy* test are satisfied and White is therefore entitled to relief. We shall remand the case to the district court for a determination of the relief to which he is entitled.

CONCLUSION

With respect to Professors Shepley and Gavenda, the judgment of the district court is AFFIRMED. With respect to Professor White, the judgment of the district is REVERSED. The case is REMANDED to the district court for further proceedings in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EDWIN B. ALLAIRE, ET AL.

V. **CIVIL ACTION NO. A-75-CA-162**

LORENE L. ROGERS, ET AL.

MEMORANDUM OPINION AND ORDER

Plaintiffs, each a tenured faculty member of the University of Texas at Austin, brought this action alleging violations of 42 U.S.C. § 1983. The Plaintiffs contend that their recommended salary increases for the fiscal year 1975-1976 were reduced by the Defendants in retaliation for constitutionally protected activities of the Plaintiffs. After having carefully considered the facts stipulated by the parties, the evidence and arguments adduced at trial, and the briefs of the parties, the Court is of the opinion that the Plaintiffs are not entitled to the relief they seek.

Each Plaintiff claims to be an outspoken and active member of the University of Texas at Austin faculty. To varying degrees, each claims to have been involved in political controversies concerning the University and the City of Austin. The Plaintiffs allege that it was in retaliation for such involvement that the Defendant Rogers reduced their proposed salary increases.

In order to understand the events with which we are concerned some explanation of the process by which faculty salaries are set is necessary. For the fiscal year 1975-1976, recommendations for faculty salaries were initiated by the departmental Budget Council or Executive Committee. This recommendation was forwarded to the Department Chairperson for review. The Chairper-

son then sends his/her recommendations, usually along with that of the Budget Council or Executive Committee, to the Dean of the college or school for review. The Dean then submits his/her recommendations, usually with the recommendations of the department chairperson and Budget Council or Executive Committee, to the President for review. The President's recommendations are transmitted to the University of Texas System Administration for review. The final review and ultimate decision as regards faculty salaries is made by the Board of Regents of The University of Texas System.

The President's responsibility in regard to the budget process is set out in the *Handbook of Operating Procedures,* The University of Texas at Austin, Section 3.17, and the *Rules and Regulations of the Board of Regents of The University of Texas System,* Part One, Chapter II, Sections 4.3 and 4.31(4).

As was previously noted, each of the Plaintiffs' salary recommendations was reduced by varying amounts by Defendant Rogers when those recommendations were before her during the budget process.

The law regarding the Plaintiffs' claims is fairly straightforward. The burden is on the Plaintiffs to show that conduct that was constitutionally protected was a "substantial factor" or a "motivating factor" in the decision to reduce the Plaintiffs' recommended salary increases. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1976). The initial burden on the Plaintiffs is somewhat less in this Circuit, as it was held to be a violation of constitutional rights to make an employment decision "partially in retaliation" for the exercise of a constitutionally protected right. *Hastings v. Bonner,* 578 F.2d 136, 141 (5th Cir. 1978). If the Plaintiff is able to meet this burden, then the Court needs to determine if the Defendant has shown by a preponderance of the evidence that the same action

would have been taken even in absence of the protected conduct. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287 (1976).

In turning to the merits of the Plaintiffs case, the Court wishes to note initially that in dealing with a university president's faculty salary recommendations, we are dealing with an area of almost totally unfettered discretion on the part of the president. There has been no challenge to the budgetary process in which the salary decisions were made, and there has been no complaint concerning the regularity of the meeting of the Board of Regents at which the budget was adopted during the regular course of business. While the decisions Defendant Rogers made concerning the Plaintiffs' salary increases may be questionable or irrational to this Court, "it is not the function of federal courts to serve as administrators of the educational system." *Flucker v. Fox Chapel Area School District,* 461 F. Supp. 1203, 1204 citing *Lovelace v. Leechburg Area School District,* 310 F. Supp. 579, 580. As Mr. Justice Stevens noted,

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error." *Bishop v. Wood,* 426 U.S. 341, 349–50 (1976).

As was previously noted, the burden is upon the Plaintiffs to show that the action complained of was in retaliation for a constitutionally protected action. After careful consideration of all the evidence presented, the Court is of the opinion that there has been no such showing. With one exception (to be discussed later), the Plaintiffs' claims can be summarized by reference to the testimony

of Dr. Edwards. Professor Edwards, an articulate individual, was asked what objective reasons he had for feeling that the lowering of his recommended salary increase was a form of retaliation. The gist of Dr. Edwards' response was that he knew of no academic or personal reason for the lowering of the recommended salary increase, therefore he could only hypothesize that his outside conduct was responsible. It is clear to the Court that this hypothesizing by the Plaintiffs is clearly insufficient to establish the claimed retaliation by the Defendant Rogers. The Plaintiffs have attempted to meet their burden by use of reasoning somewhat akin to the doctrine of *res ipsa loquitur.* This they may not do.

The only Plaintiff to tie the alleged retaliation to anything concrete is Dr. Shepley. He alleges that Dr. Rogers reduced his recommended salary increase in retaliation for his activities on behalf of the American Association of University Professors. On the basis of the testimony and other evidence presented, it is clear to the Court that Defendant Rogers' arguably taking retaliatory measures against Plaintiff Shepley was in retaliation for violating University rules concerning faculty mail, not his exercise of a constitutionally protected right. In *Hastings v. Bonner,* 578 F.2d 136 (5th Cir. 1978) the court noted that it would be a constitutional violation to decide not to renew a teacher's contract "partially in retaliation" for her exercise of associational rights. There the court also pointed out that, "[r]egardless of her freedom to associate, a teacher may not ignore a direct order of a superintendent to communicate with him while she is in his employ." *Id.,* at 140. So it is here. Professor Shepley may not ignore the University rules concerning faculty mail. There is simply no evidence to support his claim that the reduction of his recommended salary increase was based on his activities on behalf of the American Association of University Professors. This conclusion finds additional support in Plaintiffs' Exhibit 32. This note made by Dr. Griffy, Chairman of

the Physics Department, after discussing Dr. Shepley's situation with Defendant Rogers, indicates that in the course of their discussion Dr. Rogers made no mention of the American Association of University Professors.

In closing, the Court wiehes to make clear the parameters of this opinion. First, the Court wishes to again make clear that it is not within the province of this Court to consider the rationality, or lack thereof, in Defendant Rogers action with regard to the recommended salary increases of the Plaintiffs. It is the Court's responsibility to determine if the Defendants' actions were in retaliation for the Plaintiffs' exercise of constitutionally protected rights. The burden is upon the Plaintiffs to establish that the Defendants' actions were in retaliation for their exercise of such protected rights. Upon consideration of all the evidence before the Court, it is the finding of this Court that the Plaintiffs have failed to prove the reduction in their recommended salary increase was in retaliation for their exercise of constitutionally protected activities. Such being the case, they are not entitled to the relief sought. It is accordingly

ORDERED, ADJUDGED and DECREED that Judgment be, and hereby is, GRANTED for the Defendants, and that the relief requested by the Plaintiffs be, and hereby is, DENIED. Defendants' request for reasonable attorneys' fees is DENIED. This Memorandum Opinion and Order shall constitute findings of fact and conclusions of law.

Entered this 13th day of March, 1980, at Austin, Texas.

JACK ROBERTS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EDWIN B. ALLAIRE, ET AL.

V. **CIVIL ACTION FILE NO. A-75-CA-162**

LORENE L. ROGERS, ET AL.

This action came on for trial (hearing) before the Court, Honorable Jack Roberts, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged and DECREED that Judgment be, and hereby is, GRANTED for the Defendants, and that the relief requested by the Plaintiffs be, and hereby is, DENIED. Defendants' request for reasonable attorneys' fees is DENIED. This Memorandum Opinion and Order shall constitute findings of fact and conclusions of law.

Dated at Austin, Texas, this 13th day of March, 1980.

CHARLES W. VAGNER
Clerk of Court

By SALLY LOOKE
Deputy

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

October Term, 19

No. 80-1407

D.C. No. A 75 CA 162

EDWIN B. ALLAIRE, ET AL.,
Plaintiffs,

PHILIP WHITE, ET AL.,
Plaintiffs-Appellants,

versus

LORENE L. ROGERS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before RUBIN, RANDALL and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause with respect to Professors Shepley and Gavenda be, and the same is hereby affirmed. With respect to Professor White, the judgment of the District Court is reversed. The case is remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that costs be taxed equally against appellants and appellees.

October 13, 1981

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By H. E. Adams, Jr., Deputy

New Orleans, Louisiana

Issued as Mandate: Dec. 3, 1981

*Former Fifth Circuit case, Section 9(l) of Public Law 96-452 — October 14, 1980.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT A

NO. 80-1407

EDWIN B. ALLAIRE, ET AL.,

Plaintiffs,

PHILIP WHITE, ET AL.,

Plaintiffs-Appellants,

versus

LORENE L. ROGERS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING

(November 23, 1981)

Before RUBIN, RANDALL and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL
RULE 17 FOR STAY OF THE
MANDATE

*Former Fifth Circuit case, Section 9(l) of Public Law 96-452-, October 14, 1980.

Form 703-2

Opposition

Supreme Court, U.S.
FILED
MAR 26 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1569

In the Supreme Court of the United States

October Term, 1981

LORENE L. ROGERS, INDIVIDUALLY AND AS PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN, ET AL

Petitioners

Versus

PHILIP L. WHITE

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On Behalf of the Texas
Civil Liberties Union
Counsel for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

LORENE L. ROGERS, INDIVIDUALLY AND AS PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN, ET AL

Petitioners

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent, Philip L. White, for the reasons set forth below respectfully urges that Petition for Writ of Certiorari be denied.

The Court of Appeals reversed that portion of the trial court's judgment that had denied relief to Respondent Philip L. White. The Court concluded that the trial court's fact findings with respect to Dr. White were "clearly erroneous", relying "primarily upon the admissions of President Rogers at her deposition and at trial." According to the Court of

Appeals based on the Defendants "admissions" we conclude "with little difficulty that White's activities on behalf of TACT were a substantial factor in Roger's decision to withhold the $400 merit raise she had initially awarded him". Based on the record before them the Court of Appeals has concluded that "but for White's political activities" the Defendant would not have rescinded "her grant of the $400 merit raise to him".

In light of this factual conclusion the Court of Appeals rightly held that the Plaintiff had satisfied its burden under *Mt. Healthy School District v. Doyle,* 429 U.S. 274 (1972) by proving that his constitutionally protected activities was a substantial and motivating factor in the decision to rescind the merit raise. At the time of trial Rogers made no serious attempt to show that the rescission would have occurred in absence of White's protected activity and the Court of Appeals rightly concluded that "Rogers has failed to prove that she would have made the same decision even in the absence of the protected conduct". The Petition for Certiorari, apparently in recognition of these record deficiencies is replete with assertions that find no record support. For example, the Petition for Certiorari asserts that President Rogers had "apparently intervened" to secure Dr. White's promotion (P. 6) and argues that Dr. Rogers was intending "to

protect" Dr. White in rescinding the merit increase (P. 8). These are late-blooming claims that are not borne out by the record.

The Petition for Certiorari does not suggest that the decision of the Court of Appeals is in conflict with the decisions of any other federal Court of Appeals. The federal questions presented have been settled by the Supreme Court opinion in *Mt. Healthy (supra)* and the Court of Appeals was faithful in its application of the principles of *Mt. Healthy*. None of the reasons contemplated by Rule 17 of the Supreme Court rules are present to justify the grant of certiorari and we respectfully urge that the petition be denied.

Respectfully Submitted,

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Austin, Texas 78701
(512) 476-4822

On Behalf of the Texas Civil Liberties Union Counsel for Respondent

CERTIFICATE OF SERVICE

By affixing his signature to the above and foregoing, David R. Richards certifies that a true and correct copy of same has been forwarded to Laura S. Martin, Assistant Attorney General, Supreme Court Building, Austin, Texas 78711.

DAVID R. RICHARDS